Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 199

ROBERT M. PECK, Trustee of the Robert M. Peck, M.D., Inc. Defined Benefit Pension Trust, and RUTH R. PECK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF RAPHAEL METZGER
RAPHAEL METZGER, ESQ.
350 ELM AVENUE, SECOND FLOOR
LONG BEACH, CA 90802
TELEPHONE: (310) 437-4499
TELECOPIER: (310) 436-1561

ATTORNEY FOR PETITIONERS,
ROBERT M. PECK AS TRUSTEE OF THE ROBERT M. PECK M.D., INC. DEFINED BENEFIT PENSION TRUST AND MRS. RUTH R. PECK

9 CPP

QUESTIONS PRESENTED FOR REVIEW

1. Whether James v. U.S., 366 U.S. 213 (1961) (deeming embezzled funds taxable) should be applied with 31 U.S.C. § 3713 (the insolvency statute) to bestow embezzled funds on the IRS rather than restoring them to embezzlement victims, where the embezzler has paid taxes on all his income except the embezzled funds.

2. Whether the application of James and the insolvency statute, bestowing embezzled funds on the IRS rather than restoring them to embezzlement victims, constitutes a taking of property in violation of the Fifth Amendment.

3. Whether the application of James and the insolvency statute to embezzled funds deprives the embezzlement victims of their rights to substantive due process of law in violation of the Fifth Amendment.

THE PARTIES

The only parties who participated in the proceedings in the Court of Appeals are Petitioners and the United States.

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Dr. Robert M. Peck and Mrs. Ruth R. Peck petition the Honorable Justices of the Supreme Court for review on writ of certiorari of the Judgment rendered by the Court of Appeals for the Ninth Circuit.

I

REFERENCE TO PUBLISHED OPINIONS

The decisions of the District Court and Court of Appeals in this case have not been published. However, the California Court of Appeal published an opinion in a related case: Peck v. Hagen, 215 Cal.App.3d 602, 263 Cal.Rptr. 198 (1989).

II

BASIS FOR JURISDICTION

The Judgment of the Court of Appeals was entered on September 22, 1993. Petitioners filed a Petition for Rehearing on October 2, 1993. On November 2, 1993, the Court of Appeals issued an Amended Memorandum which addressed the constitutional issues presented and entered an order denying the Petition for Rehearing.

Certiorari is appropriate pursuant to Rule 17.1(c) of the Rules of the Supreme Court, because the Court of Appeals decided important questions of federal statutory and constitutional law which have not been, but should be, settled by this Court.

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 5

No person shall be . . . deprived of life, liberty, of property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Federal Insolvency Statute

(1) A claim of the United States shall be paid first when--

(A) a person indebted to the Government is insolvent and--

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under Title 11.

31 U.S.C. § 3713(a) (West's 1993)

IV

STATEMENT OF THE CASE

Stephen Henry embezzled all the pension funds of the Pecks and others, was convicted and sentenced in federal district court, but was not required to make restitution, because he had made an assignment of his assets for the benefit of the victims of his embezzlement. Although he paid taxes on all his legitimate income, Henry did not report income on the funds he embezzled.

The Pecks obtained a judgment against Henry and sought to execute against property held by Henry's assignee. The assignee then sued the IRS in interpleader as a potential claimant of Henry's estate. Upon being sued, the IRS claimed that Henry owed $4.5 million in taxes and penalties -- all on the embezzled income.

Applying the rule of James v. United States, 366 U.S. 213 (1961) and 31 U.S.C. § 3713 (the insolvency statute), the District Court determined that the embezzled funds were taxable to Henry and that the IRS had priority over the Pecks because tax liabilities on the embezzled funds rendered Henry insolvent. Consequently, the IRS got all the money, rather than the Pecks and others from whom Henry had embezzled the funds. The District Court declined to address the Pecks' Fifth Amendment takings and due process claims. The Ninth Circuit affirmed, also without addressing the constitutional issues. Hence, the Pecks petitioned for rehearing. The Ninth Circuit issued an Amended Memorandum rejecting the constitutional claims, and denied the Pecks' Petition for Rehearing.

V

ARGUMENT REGARDING STATUTORY CLAIMS

In Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404 (1946), the Court held that embezzled funds are not taxable income to the embezzler. The Court interpreted the Internal Revenue Code as stating that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Id., 327 U.S. at 408, 66 S.Ct. at 549. Embezzled funds, the Court reasoned, failed both parts of the test. Id., 327 U.S. at 409-410.

Fifteen years later, a fractured Court overruled Wilcox in James v. United States, 366 U.S. 213 (1961), stating:

> We should not continue to confound confusion, particularly when the result would be to perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income.

Id., 366 U.S. at 221, 81 S.Ct. at 1056.

Although the James court held that embezzled funds should be treated as income taxable to the embezzler, it did not decide whether embezzled funds should be so treated when doing so impaired the victim's ability to obtain restitution.

"The question of whether the Government should be entitled to its taxes

on the embezzled funds even if it meant the victim would not recover was not a direct issue in the case and was not discussed in the majority opinion." In re Diversified Brokers Company, Inc., 487 F.2d 355, 359 (8th Cir. 1973).

Justice Black did, however, address the issue in his dissent in James: "[S]ubjecting the embezzled funds to a tax would amount to allowing the United States 'a preferential claim for part of the dishonest gain, to the direct loss and detriment of those to whom it ought to be restored.'" Id., 366 U.S. at 227, (Black, J., dissenting), quoting, McKnight v. Commissioner of Internal Revenue, 127 F.2d 572, 574 (5th Cir. 1942).

Treating the funds which Henry embezzled from the Pecks as taxable income did not prevent his unjust enrichment,

because Henry made an assignment of assets for the benefit of his victims. Treating the embezzled funds as taxable income, as the lower courts did, only punished the Pecks and the other victims of Henry's embezzlement by depriving them of restitution of their property.

In James, Justice Black found no basis for concluding that Congress intended its tax laws to impose a double tax on victims of embezzlement:

> There has been nothing shown to us on any of the occasions when we have considered this problem to indicate that Congress ever intended its income tax laws to be construed as imposing what is in effect a property or excise tax on the rightful owner's

embezzled funds, for which the owner has already once paid income tax when he rightfully acquired them. In our view, the Court today does Congress a grave injustice by assuming that it has imposed this double tax burden upon the victim of an embezzlement merely because someone has stolen his money, particularly when Congress has refused requests that it do so. The owner whose funds have been embezzled has done nothing but entrust an agent with possession of his funds for limited purposes, as many of us have frequent occasion to do in the course of business or personal affairs. Id. at 228.

Petitioners submit that the rule of James makes sense when an embezzler seeks to avoid payment of taxes on embezzled income, but that the rule should be otherwise when it would operate to deprive victims of embezzlement of their ability to obtain restitution. The present case presents precisely such a situation. Petitioners request the Court to so limit the holding of James.

VI

ARGUMENT REGARDING CONSTITUTIONAL CLAIMS

Petitioners also request the Court to grant certiorari on their takings and substantive due process claims. The Court of Appeals summarily rejected the Pecks' takings claim, writing:

> Because the original version of § 3713 was enacted over two hundred years ago, its enactment did not result in a "taking" of the Pecks' lien interest; no pre-existing property right has been impaired by the subsequent enactment of a statute.

From this language it appears that the Ninth Circuit is of the opinion that statutes which predate the Bill of Rights are exempt from its protections. Such a proposition is not supported by precedents of this Court -- certainly not United States v. Security Industry Bank, 459 U.S. 70 (1982), the only case cited by the Court of Appeals in support of its rationale quoted above.

"The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution." Den v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272, 281 (1856) (emphasis added).

In his dissent in James, supra, Justice Black perceived a constitutional infirmity in taxing embezzled funds, thereby impairing victims' ability to obtain restitution of their property:

> If Congress ever did manifest an intention to select the mere fact of embezzlement as the

> basis for imposing a double tax on the owner, we think a serious question of confiscation in violation of the Fifth Amendment would be raised.

James, supra, 366 U.S. at 228-229.

Several facts pertinent to the present case compel the conclusion that the judgment of the District Court effected a taking of the Pecks' property without just compensation. First, since an embezzler acquires no title to embezzled property, the funds which Henry embezzled have always been and remain the property of Henry's victims. Second, through the legal fiction created by James, the embezzled funds were treated as Henry's property for tax purposes. Third, the IRS taxed the embezzled funds,

although Henry had never obtained title to them. Fourth, since the embezzled funds remain the property of Henry's victims, such tax constitutes a double tax on Henry's victims, who already paid income tax on the funds upon their acquisition. Fifth, by means of the fiction created in James and the insolvency statute, the IRS has taken all of the remaining funds Henry embezzled, depriving the Pecks of their property in its entirety.

Petitioners respectfully submit that these facts warrant this Court's consideration whether a taking in violation of the Fifth Amendment has occurred. A number of this Court's decisions support such a conclusion.

In Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 (1992), the Court recently held that where a property

owner "has been called upon to sacrifice **all** economically beneficial uses [in his property] in the name of the common good . . . , he has suffered a taking." The Court also held that compensation is required "without case-specific inquiry into the public interest advanced" by the government where such a taking occurs. Id.

The Pecks obtained writs of attachment on Henry's home. Upon entry of judgment against Henry, these writs ripened into judgment liens which the Pecks promptly executed, thereby perfecting their liens on specific real property in Henry's possession. The Supreme Court has held that such liens are property interests protected by the Fifth Amendment.

In Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1663, 3 L.Ed.2d 1554 (1960), materialmen delivered materials to a general contractor for use in constructing Navy personnel boats. Under state law, they obtained non-possessory, nonpurchase-money liens in the vessels. The general contractor defaulted on his obligations, and the Government took title to and possession of the uncompleted hulls and unused materials, making it impossible for the materialmen to enforce their liens. The Court held that this constituted a taking, writing: "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." Id. at 48.

United States v. Security Industrial Bank, 459 U.S. 70 (1982) concerned the effect of a provision of the Bankruptcy Reform Act of 1978 which permitted debtors to avoid nonpossessory, nonpurchase-money liens on household furnishings and appliances. The Government sought to distinguish Armstrong on the ground that it involved a classical "taking" in the sense that the Government acquired for itself the property in question, while the bankruptcy provision imposed an economic regulation which in effect transferred the property interest from a private creditor to a private debtor. The Court was not impressed with the distinction. To avoid holding the Act unconstitutional under the Fifth Amendment, the Court construed the Act as applying only prospectively to liens created after its effective date.

These cases show that whether the Government destroys a lien by seizing the property it secures or by transferring the lien to another, the result is still an unconstitutional taking.

Applying the principles of Armstrong and Security Industrial Bank to the present case, the IRS effected a partial unlawful taking of the funds owned by the victims of Henry's embezzlement, when it deemed them Henry's property for tax purposes and asserted a claim to them for Henry's taxes due. The IRS effected a complete unlawful taking of such property when, pursuant to the judgment below, it took all the embezzled funds without paying just compensation to the victims of Henry's embezzlement.

"The Fifth Amendment's guarantee that private property shall not be taken for a

public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

Here, fairness and justice indicate that if Henry is unable to pay taxes upon the funds he embezzled, the burden of funding such debt to the treasury should be borne by the public at large, rather than the victims of Henry's embezzlement. Indeed, if any taxpayers should be exempt from covering such debt, it is the victims of Henry's embezzlement, who have suffered special harm from Henry's embezzlement.

Although the Pecks asserted a substantive due process challenge to the insolvency statute as applied, the Ninth Circuit upheld the statute as neither arbitrary nor capricious on its face. In so doing, the Court of Appeals simply avoided the due process claim asserted by the Pecks.

In United States v. Salerno, ___ U.S. ___, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987), Justice Rehnquist, speaking on behalf of the Court, explained that "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights 'implicit in the concept of ordered liberty,'" Palko v. Connecticut, 302 U.S. 319, 325-326, 58

S.Ct. 149, 152, 82 L.Ed. 288 (1937). Id.

The Court has also stated that "the Due Process Clause, like its forebear in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), quoting Hurtado v. California, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 (1884), Bank of Columbia v. Okely, 4 Wheat (17 U.S.) 235, 244, 4 L.Ed. 559 (1819).

"The conceptual essence of "substantive" due process is the notion that the Due Process Clause -- in addition to setting procedural minima for deprivations of life, liberty, or property -- bars outright 'certain government actions regardless of the fairness of the procedures used to implement them.'"

Brennan v. Stewart, 834 F.2d 1248, 1255 (5th Cir. 1988), quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

The substantive component of the Due Process Clause "serves to prevent governmental power from being 'used for purposes of oppression.'" Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986); Den v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272, 277, 15 L.Ed. 372 (1856).

As the Court stated in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992), "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise the same capacity which by tradition courts always have exercised: reasoned

judgment. Its boundaries are not susceptible of expression as a simple rule."

Although most cases finding violations of substantive due process arise regarding law enforcement abuse (excessive force and police brutality), due process protects property no less than life and liberty. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1408-1409 (9th Cir. 1989).

In the context of personal jurisdiction, which concerns basic property rights, the Court has long held that substantive due process requires that "the maintenance of [a] suit not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

In the present case the IRS claimed priority under the insolvency statute to the funds embezzled from the Pecks. Despite its finding that granting "the taxing authorities . . . priority over [the Pecks] has substantial elements of unfairness," the District Court held the Pecks' interests subordinate to that of the IRS, which ruling was affirmed by the Court of Appeals.

The decision of the lower courts does not comport with the requirements of "fair play and substantial justice," International Shoe, supra, or "reasoned judgment," Planned Parenthood, supra, under the Fifth Amendment.

VII

CONCLUSION

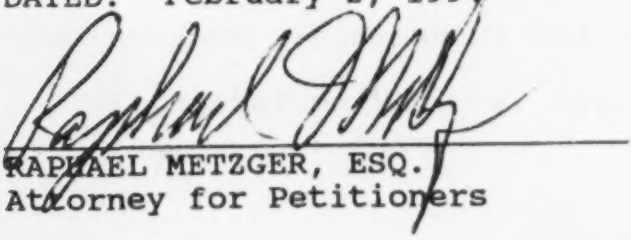
The result which the lower courts reached in this case is grossly inequitable. Most citizens of this country work hard their whole lives to save enough to sustain them during their retirement years. When the pension funds of such law-abiding citizens are embezzled, their entire world is shattered. To recover their funds, they must engage lawyers to sue the embezzler, obtain a judgment and execute -- assuming the funds haven't been squandered. At great expense, some victims obtain a judgment and locate funds on which to execute. For the IRS to then claim it is entitled to the funds solely because they were embezzled is perverse indeed.

When the federal courts bestow all the embezzled funds on the IRS, rather than restoring them to the embezzlement victims, the pensioners are victimized once again -- by their own government.

This gross injustice is the aberrant result of the odd conjunct application of a venerable statute and a recent decision of this Court whose rationale was to prevent the unjust enrichment of embezzlers. It is just such overreaching by the government that was intended to be curtailed by the Fifth Amendment.

Petitioners therefore request the Court to grant certiorari to review the issues presented by this Petition.

DATED: February 2, 1994



RAPHAEL METZGER, ESQ.
Attorney for Petitioners

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. CV87-7220-HLH (Kx) Date 3/22/91

Title Abrams, et al. v. Henry, et al.

DOCKET ENTRY

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CLERK, U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PRESENT:

HON. HARRY L. HUPP, JUDGE

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Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Thomas D. Coker (for counter-deft U.S.)

Arthur C. De Goede, DAG (for FTB)

ATTORNEYS PRESENT FOR DEFENDANTS:

Marshall A. Rutter (for deft Susie Henry)

Raphael Metzger (for counter-defts Pecks)

PROCEEDINGS: Counter-Defendant's U.S.'s Motion for Summary Adjudication; Counter-Defendant Franchise Tax Board's Motion for Summary Judgment; Susie J. Henry's Motion for Summary Judgment; Robert M. Peck's and Ruth R. Peck's Motion for Summary Judgment

ORDER (also, if applicable, findings and memorandum opinion):

This matter was submitted on 3/18/91 and is now decided.

The respective motions for summary judgment or for adjudication of issues are granted and denied as set forth below.

The court appreciates the hard and thorough work of the parties in reaching a stipulation of facts so that these issues could be posed for decision.

The background of this case is that various parties claim creditor interests in the assets of Stephen Henry, who assigned the assets to Hagen for benefit of creditors (hereafter "the assignment" or "assignment"). Two groups of these creditors square off in these motions. The tax creditors (the IRS and the FTB) claim priority over Susie J. Henry (hereafter SJH), holder of deeds of trust on certain properties transferred to Hagen and then sold, Robert M. Peck and Ruth R. Peck (hereafter P&P), who attached a piece of realty thereafter sold and later levied execution on the proceeds of that <p. 2> sale in the hands of the assignee, and First Professional Bank (hereafter FPB),

who had an attachment lien on certain realty but has not participated in these motion proceedings. The tax claimants move for summary judgment against the "lien claimants" and vice versa (except for FRB). The rights inter se among the tax claimants and among the lien claimants are not at issue on these motions.

The basic theory of the tax claimants is that under federal (31 USC § 3713) and state (Cal. R&T Code § 18933) law, on insolvency, tax obligations are to be paid first. Federal and state law, however, differ in certain respects, leading to the possibility of different results. The IRS takes the position that its priority is absolute under the federal statute in question, overriding even recorded deeds of trust. FTB makes more modest claims by virtue of the state statute which recognizes certain types of lien claims.

Certain issues are common to a number of the motions and are determined as follows: The assignment by Mr. Henry for the benefit of creditors was a general assignment for the benefit of creditors under the contemplation of both federal and state law. Thus, the statutes that trigger "super" government priority on a general assignment for the benefit of creditors were triggered on November 18, 1988, when the assignment was made. The argument that the assignment was not a general one (i.e., that Mr. Henry withheld more assets as exempt than he was entitled to) must be rejected on the plain language of the assignment which conveys to the assignee everything which is not exempt. It is also argued that Mr. Henry is not shown to be insolvent. This contention strikes the court as frivolous. The claims of the IRS alone are four times the

assets. In any event, the making of the general assignment for the benefit of creditors is sufficient to trigger the sections under which the IRS and the FTB claim. It is suggested that the sale of the properties creates a preference in favor of the senior lien holders who were paid off; the court rejects this notion because a preference is usually considered to be a favoring of one creditor in a class over others in that class.

1. Issues raised by the motions of SJH and IRS and FTB against each other: First, that portion of the SJH motion which desires to have it determined that her interest in certain community property in the hands of the assignee is free from tax debts of Mr. Henry is denied. While the separate property of SJH would not be liable for the debts of her spouse, the

community property is liable for the debts of either spouse. Thus, if property in the hands of the assignee is partly community property of SJH, it would not be free of the claims of Mr. Henry's tax creditors. Second, the court rejects certain of the basic arguments of the IRS. The IRS postulates that the lien of a deed of trust on real property is subordinate to the IRS's right to priority to assets of the debtor. This has not been the law since the enactment of the predecessor of 3713 in 1797 as shown by Hooe 1805 2 LEd 370; Thelusson 1817 4 LEd 271, and numerous cases since which need not be cited since they are in counsel's briefs. The IRS has shown no case where a signed and recorded deed of trust or mortgage is not such a perfected lien that it does not have priority even under the rigorous section 3713. This stands in contrast to

numerous cases where other types of liens have not been considered sufficiently precise and "perfected" to stand against the section (i.e. Maclay '33 288 US 290 (judgment lien); Gilbert Associates '52 345 US 361, 97 LEd 1071 (city tax lien), Division of Labor Law Enforcement 9Cir'52 201 F2d 857 (labor lien)). The IRS argues from certain cases in the 30s that perhaps a mere lien would not do, recognizing from the old cases that a <p.3> transferred interest has priority. However, California practice with deeds of trust involve a full transfer of legal title to the real property to a trustee, thus making the ancient law fully (and fairly) applicable here. Thus, the court rejects the primary IRS argument that SJH had to foreclose on her deeds of trust before the assignment for benefit of creditors in order for the deeds of trust to be effective. Third, the

court rejects any claim by the IRS that SJH is liable to the same extent that Mr. Henry is liable. Whether or not this is true is not at issue in this proceeding. If SJH is liable to the IRS, it has plenty of remedies when it comes time to distribute assets of the estate (if any) to SJH. Fourth, IRS argues that SJH's deed of trust lien is not given for money or money's worth and that, therefore, under IRS regulations, the deeds of trust do not constitute recognizable liens. It would treat SJH's lien rights as if they arose out of some incidence of marriage like dower or curtesy. The IRS has failed to recognize the essence of the community property system. What SJH surrendered to obtain her deeds of trust were not mere incidence of marriage like dower, but a 50% interest as an owner of the property. That being the case, she has given money

or "money's worth" for the deeds of trust under IRS regulations. In addition, this argument goes against the stipulation of the parties, which was to the effect that SJH had a valid lien. Thus, if the question was whether SJH has a lien on realty by virtue of the deeds of trust, the court would find no difficulty in saying that the answer was "yes". But there are further facts as to which neither party has been able to cite any authority. Following the transfer of the realty to the assignee, subject to the deeds of trust, the assignee desired to sell the property. It is apparent that the liens were so numerous and their priority so obscure, that the property had to be sold with the proceeds to be held until later proceedings determined the validity and priority of the liens. Thus, SJH and other creditors claiming liens agreed with

the assignee that the lien claims would be transferred to the proceeds of the sale in the hands of the assignee (and in some cases in the joint hands of the assignee and the creditors). Thus the property could be sold and clear title passed while the lien holders with indubitable priorities could be paid. This was done. The net proceeds are being held subject to the claims of SJH, P&P, and FRB. (P&P and FRB claim liens on the proceeds of only certain properties). The agreements provided that the lien of the deed of trust (in the case of SJH) or the attachments (for P&P and FRB) were transferred to the proceeds of the sale. IRS argues that the liens were destroyed in the case of SJH by the reconveyance of the deeds of trust and that it was not bound by the agreements with the assignee to transfer the liens to the proceeds (of

course, the IRS had not then made a claim in the assignment estate, nor had it claimed any priority at that time). This circumstance gives the court some difficulty. No party has cited cases saying whether a lien maintains its priority when it changes form, or can do so only with the agreement of all parties, known or unknown. No case has considered 3713 in this context. From the standpoint of proper and efficient management of the assignment estate, the power to transfer the lien to the proceeds seems necessary, and, of course, this is done in bankruptcy all the time. IRS argues that no one sought its agreement, but, of course, at that time the IRS was refusing to participate in the assignment estate in any way. The agreement of the IRS should be irrelevant in any event from the standpoint of estate management; there

seems no reason why one creditor should be given that type of monkey wrench. On principle, the court thinks that in this situation, the lien should be able to be transferred to the proceeds without loss of priority. However, considering the stringent language of 3713--that on insolvency the United States comes first, period--with a limited case made exception for only the strongest types of liens, the question is not without <p. 4> its doubts. The court holds that the lien of the deeds of trust may be transferred to the proceeds and retain their priority. The liens are specific, the amount is certain, the fee holder is fully deprived on any interest or possibility of claim, and the property to which the lien attaches is certain, specified, sequestered, and not commingled. In short, the lien bears all of the attributes of the one it replaces.

The court holds that the lien interest of SJH on the funds to which it attaches is superior to that of the United States. With this holding, the FTB becomes an a fortiori case. Unlike 3713, the FTB claims under R&T Code 18933, which allows for the priority of a "lien or security interest which was recorded or perfected prior to the time when the state records or files its lien...". The state has not yet recorded or filed its lien, but claims to be a creditor. Since under any viewpoint, SJH has a lien recorded or perfected prior to the unsecured or later secured claim of the FTB, her interests are prior to that of the FTB, whether or not they emanate from the deeds of trust or the agreed substitute lien with the assignee. However, the SJH community property claims meet the same fate they did with the IRS.

2. The P&P claims do not have priority over the taxing agencies. The court rejects certain of the P&P positions. The state Court of Appeal decision is not res judicata of anything between the parties to these motions. As set forth above, there is no triable issue of fact as to the nature of the assignment or the insolvency. The IRS and FTB claims as they pertain to P&P have considerable irony. Their claim is that Henry omitted to report as income funds that he embezzled from P&P, inter alia, and for which P&P have a judgment against Henry. Thus, if IRS and FTB are correct, they take a share of the funds embezzled from P&P and (add irony to irony) enhance Henry's taxable income by preventing repayment to P&P! Thus, to hold, as the law appears to require, that the taxing authorities have priority over P&P has

substantial elements of unfairness. The facts appear to be that P&P levied an attachment lien on the Vista Canada property prior to the assignment (but within 90 days thereof). Following the assignment, the assignee sold the property with an agreement between the assignee and P&P that the attachment lien would transfer to the proceeds of the sale. The proceeds of the sale were segregated for this purpose out of the control of Mr. Henry and in the joint control of the assignee and P&P pending determination of priorities among then existing lien claimants. P&P then obtained a judgment against Mr. Henry and a writ of execution was levied on the segregated funds. The state Court of Appeal subsequently upheld (on res judicata grounds) the execution levy.

The legal conclusion which must be

drawn is that the attachment levy did not give P&P the type of specific, existing, unconditional, fixed type of lien recognized in Thelusson and subsequent cases which would prevail over rights obtained by the United States when the assignment was made. There is what appears to be Ninth Circuit authority in point. In Division of Labor Law Enforcement 9Cir'53 201 F2d 857, the court squarely holds that the inquiry is to be as the nature of the claimed lien when the assignment takes place. It is reasoned that 3713 (or, in that case, its predecessor) gives to the United States "rights" when the act of insolvency (there, as here, an assignment for the benefit of creditors) takes place. Thus subsequent "perfecting" does not interfere with the "rights" obtained by the United States at the time of assignment. Here, the attachment lien was

subsequently perfected by the obtaining of a judgment and the levying of a writ of execution (which, in the court's opinion, qualifies as a specific property-divesting type of lien which qualifies under Thelusson). Under California <p. 5> law, the execution lien relates back to the date of the attachment. However, the government points out that whether the lien is the type that qualifies for priority is a matter of federal law (citing Gilbert Associates, supra, which holds that a state tax lien which had the effect of a judgment under state law but which did not have property divestment features to it did not qualify it for Thelusson-type priority under a predecessor of 3713). That analysis seems to apply here. The California relation-back rule could not change the super-priority which the federal

government seizes for itself by § 3713 on the occurrence of insolvency. Since Division of Labor Law Enforcement, supra, sets the measuring date for priority as of the date of the assignment, the obligations to the United states come before the rights of P&P.

The FTB stands in a somewhat different situation. It apparently assumes that because of its different statutory rights, a valid attachment would have priority over state tax debts, but says that the attachment lien ceased to exist as a matter of law by the operation of Cal. CCP § 493.030(a) which provides: "The making of a general assignment for the benefit of creditors terminates a lien of .... attachment if the lien was created within 90 days prior to the making of the general assignment". Because the court has held above that the assignment was a

general assignment, the above quoted anti-preference rule eliminates the attachment lien as of the filing of the general assignment. It is pointed out that the Superior Court refused to so hold when the attachment was attacked by the assignee on this ground. However, the FTB is not bound by res judicata as to this holding and, indeed, the ground on which the Superior Court acted is not clear on this record. This court's holding that the assignment was a general one has the effect of eliminating the attachment lien. While it might be argued (as was said in the court's tentative ruling) that the denial of the motion left the lien in effect, it now appears to the court that 430.030(a) is self executing, leaving FTB free to argue that on assignment, its priority is secured as to liens not at that time attaching, leaving the later

execution as moot insofar as it affects the interests of the FTB.

With some reluctance, the court holds that the interests of P&P are subordinate to that of the IRS and the FTB.

3. The motion of the taxing authorities against FPB must be granted. FPB has not replied to the summary judgment motions of the IRS and the FTB. This failure to reply is taken as consent to the granting of the motion. The court is informed that FRB filed a joinder in the opposition of SJH and P&P after the motion was argued and submitted. Even if such a procedure were permitted, it would in any event be ineffective, since the case against FPB depends on its own facts and not the facts as they pertain to someone else. In any event the motions appear to be good. All FPB had, according

to the stipulation, was a post-assignment and now expired attachment. Even if not expired, the discussion above shows that such an attachment does not compete in this league against either the IRS or the FTB.

The FTB appears to raise certain issues as to Hagen which are not appropriate in resolving the issues to the claimants of the estate. Those issues are not decided.

Counsel for SJH to prepare comprehensive order covering all of the determinations made above. Said order to be circulated for approval as to form (recognizing that there is no agreement as to substance). Then submit <p. 6> to the court for signature. Said order may have to specify specific items not directly discussed but covered by implication in this determination.

MARSHALL A. RUTTER
JANINE NESBIT ROPER
RUTTER, O'SULLIVAN, GREENE &
HOBBS INCORPORATED
1900 Avenue of the Stars, Suite 2200
Los Angeles, California 90067
(213) 879-949

Attorneys for Plaintiff SUSIE J. HENRY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARNOLD ROBERT ABRAMS, et al., Plaintiffs v. STEPHEN HARRISON HENRY, et al., Defendants.	)	CASE NO. CV87-7220 HLH CV90-3972 HLH Consolidated JUDGMENT
SUSIE J. HENRY, Plaintiff, v. IRA REINER, District Attorney, etc.; EARLE HAGEN, etc., et al. Defendants.	)	FILED FEB 3 1992 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA
EARLE HAGEN, etc., Plaintiff, v. GEORGE OAKES, etc., et al., Defendants. AND RELATED CROSS ACTIONS	)	ENTERED FEB 5 1992 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

RECITALS

A. On March 18, 1991, the following matters were submitted to this Court for consideration, the Honorable Harry L. Hupp, Judge presiding:

(a) Counterdefendant United States Internal Revenue Service's ("IRS") Motion for Partial Summary Judgment;

(b) Counterdefendant Franchise Tax Board's ("FTB") Motion for Summary Judgment;

(c) Susie J. Henry's ("Susie") Motion for Partial Summary Judgment;

(d) Robert M. Peck as Trustees of the Robert M. Peck, M.D. Defined Benefit Pension Plan and Ruth R. Peck's (the "Pecks") Motion for Partial Summary Judgment.

B. The Court, on May 22, 1991 entered an order on said motions (the "Partial Summary Judgment Order"). The issue of

the validity of Susie's claim was not adjudicated by the Partial Summary Judgment Order. Pursuant to the Partial Summary Judgment Order; the Court ordered that Susie's claim, if valid, was entitled to priority to the sales proceeds on the Vista Canada, Idylwild and Bermuda Dunes Properties in the assignment estate held by Earle Hagen ("Hagen"), assignee for the benefit of creditors of Stephen H. Henry over the IRS and the FTB.

C. The Court found, in ruling on the motions for summary adjudication, that Stephen H. Henry was insolvent at the time he made his assignment for the benefit of creditors and that said assignment was a valid general assignment. <p.3>

D. The Court further ordered that the IRS was entitled to priority over all other creditors of Stephen H. Henry, excluding Susie and including the Pecks,

First Professional Bank and the FTB.

E. On September 6, 1991, this Court heard Susie's Motion for Summary Judgment, or, Alternatively, for Partial Summary Judgment. This Court determined that there was no triable issue of fact as to whether the marital settlement agreement between Susie and Stephen Henry and its associated transfers was a fraudulent conveyance and that Susie was entitled to a determination that the marital settlement agreement and its associated transfers were not fraudulent conveyances.

F. This Court further determined that there was a triable issue of fact as to whether the reconciliation of Susie and Stephen Henry was accompanied by a mutual rescission of the marital settlement agreement. This Court also determined that triable issues of fact exist as to Susie's entitlement to the jewelry in the

assignment estate.

G. The parties hereto, through their attorneys of record, have executed a Stipulation for Dismissal and Order whereby the Abrams plaintiffs and First Professional Bank dismissed their claims in this action.

H. Susie, the IRS, the FTB, and Hagen have entered into written stipulations on file herein settling these consolidated matters, (CV 87-7220-HLH(Kx) and CV 90 3972-HLH) and all related cross-actions and actions and specifically including a settlement and dismissal with prejudice of Hagen v. Oakes.

Based upon the Partial Summary Judgment Order, the <p. 4> stipulations among Susie, the IRS, the FTB, and Hagen, and the Stipulation for Dismissal and Order of the Abrams plaintiffs and First Professional Bank, and based upon the fact

that the Court is satisfied that, from the record in this action there are no further issues to be adjudicated and that there are insufficient assets in the assignment estate held by Hagen to satisfy the entire claim of the IRS, and based upon the fact that this Court has determined that the IRS has priority over all other claimants with the exception of Susie, the Court hereby determines that judgment in this action should be entered forthwith, as follows:

ORDERS

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is entered in favor of Susie J. Henry ("Susie") as a secured creditor of Stephen H. Henry in the amount of $ 150,000, which amount shall be paid forthwith to her by Earle Hagen, as assignee for the benefit of creditors of

Stephen H. Henry, first from the sale proceeds of the real property known as Idylwild (as such is defined in the Stipulated Statement of Uncontroverted Facts and Designated Record re Motions and Cross-Motions for Partial Summary Judgment filed on December 6, 1990), and second from the sale proceeds of the real property known as Vista Canada (as such is defined in the Stipulated Statement of Uncontroverted Facts and Designated Record re Motions and Cross-Motions for Partial Summary Judgment filed on December 6, 1990) in the assignment estate of Stephen H. Henry in the possession of assignee Earle Hagen;

2. Said funds shall be deemed to be a return of principal of $75,000 and payment of interest of $75,000 on a separate <p. 5> property promissory note owned by Susie.

3. Susie is also awarded, as her separate property, all other jewelry delivered voluntarily to Earle Hagen, as assignee for the benefit of creditors, or seized by the District attorney of Los Angeles County and thereafter delivered to Hagen. Said jewelry shall be delivered forthwith to Susie, and such jewelry is adjudicated to be her separate property;

4. The United States Internal Revenue Service shall take the remaining assets of the assignment estate of Stephen R. Henry currently in the possession of assignee Earle Hagen, less fiduciary income taxes paid or to be paid to the IRS or the FTB by Hagen, as assignee, on all property not ultimately determined to be the property of a secured creditor. Each creditor determined to be a secured creditor shall be responsible for payment of any and all taxes, if any, due on said property,

including taxes payable to the IRS and the FTB, and less appropriate costs of administration, including fees of Hagen and his attorneys; and the court reserves jurisdiction to determine allocation of administration expenses as among secured and unsecured creditors such being relevant.

5. Because the amount of the I.R.S.'s claim is greater than the amount of funds being held by Hagen, the court rules that the claims of Robert M. Peck, M.D., as trustee of the Robert M. Peck, M.D., Defined Benefit Pension Trust and Mrs. Ruth R. Peck (the "Pecks") and the California Franchise Tax Board are moot, and they shall take nothing in this action. The validity and amount of the Pecks' claim have not been adjudicated in this action. In the event the Pecks appeal this judgment and are ultimately

successful, and the matter is remanded to this court for further proceedings, the validity and amount of such claim and the issue whether it has been properly asserted shall be among the issues which would be before the court on remand.

6. Each party is ordered to bear its own cost of suit with respect to Susie's complaint and cross-claim.

DATED: 2/3/92

HARRY L. HUPP
Judge
United States District Court

Submitted by:

RUTTER, O'SULLIVAN, GREENE &
HOBBS INCORPORATED
MARSHALL A. RUTTER
JANINE NESBIT ROPER

By _____
MARSHALL A. RUTTER
Attorneys for SUSIE J. HENRY

APPROVED AS TO FORM AND CONTENT:

SALTBZURG, RAY & BERGMAN

By _____
JOHN D. MONTE
Attorney for EARLE HAGEN

UNITED STATES ATTORNEY

By _____
THOMAS D. COKER
Attorneys for INTERNAL REVENUE SERVICE

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

By _____
BONNIE HOLCOMB
Attorneys for CALIFORNIA FRANCHISE TAX BOARD

Attachment

N. Attorneys Representing Appellee(s)/Respondent(s)

ATTORNEY LIST
Abrams v. Henry

MARSHALL A. RUTTER
Rutter, O'Sullivan, Greene & Hobbs
1900 Avenue of the Stars, #2200
LosAngeles, CA 90067
(213) 879-9494
(Attorneys for Susie J. Henry)

ROBERT BECKHAM, ESQ.
Horgan, Rose, Beckham & Coren
3900 W. Alameda, Ste. 2200
Toluca Lake CA 91505
(818)955-7300
(Attorneys for First Professional Bank)

JOHN D. MONTE, ESQ.
Saltzburg, Ray & Bergman
10960 Wilshire Blvd. 10th Fl.
Los Angeles CA 90024
(213)473-8405
Attorneys for Earle Hagen, Assignee for the Benefit of Creditors)

ARTHUR C. DE GOEDE
Office of the Attorney General
300 South Spring St., 9th Flr
Los Angeles CA 90013
(213)346-2000
(Attorneys for Franchise Tax Board)

GEORGE OAKS, ESQ.
Munns, Kofford, Hoffman & Thockmorton
225 S. Lake Avenue, Pasadena, CA 91101
(213)681-2321
(Attys for George Oakes and Munns, Kofford, Hunt, Hoffman & Throckmorton)

ROBERT S. KILBOURNE
501 W. Broadway #800
San Diego, CA 92101
(619)237-1047
(Attorneys for Robert Abrams et al)

THOMAS B. COKER,
Office of U.S. Atty
300 N. Los Angeles St.
Los Angeles CA 90024
(Atty for U.S.A.)

LAW OFFICES OF RAPHAEL METZGER
RAPHAEL METZGER, ESQ.
Bar No. 116020
350 Elm Avenue, Second Floor
Long Beach, California 90802

Attorneys for Counter-Defendants,
ROBERT M. PECK, as Trustee of the
Robert M. Peck, M.D., Inc. Defined
Benefit Pension Trust, and
RUTH R. PECK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARNOLD ROBERT ABRAMS, et al., Plaintiffs, vs. STEPHEN HARRISON HENRY, et al., Defendants.	CASE NO. CV87-7220-HLH CV90-3972-HLH NOTICE OF APPEAL
SUSIE J. HENRY, Plaintiff, vs. IRA REINER, DISTRICT ATTORNEY ETC.; EARLE HAGEN ETC.; & ALL PERSONS ETC. Defendants.	FILED FEB 23, 1992 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA LODGED FEB. 20, 1992 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA
AND RELATED CROSS-ACTIONS	

TO THE HONORABLE COURT OF APPEAL, DISTRICT COURT, TO THE PARTIES HERETO, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Dr. Robert M. Peck as Trustee of the Robert Peck, M.D., Inc. Defined Benefit Pension Trust and Ruth R. Peck hereby appeal to the United States Court of Appeal for the Ninth Circuit from the judgment entered by the District Court in this case on February 3, 1992, a copy of which is attached hereto.

DATED: February 18, 1992

LAW OFFICES OF RAPHAEL METZGER

_____

Michael J. Kowalski, Esq.
Attorneys for Defendants
Dr. Robert M. Peck as Trustee Etc.,
and Ruth R. Peck

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NOT FOR PUBLICATION

F I L E D
SEP 22 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNOLD ROBERT ABRAMS, et al. Plaintiff-Appellee, v. UNION BANK, et al. Defendants-Appellees.	)	No. 92-553-4 D.C. No. CV87-7220 HLH MEMORANDUM*
EARLE HAGEN, Assignee for the Benefit of Creditors of Stephen H. Henry, Defendant-Appellee v. INTERNAL REVENUE SERVICE, Counter-defendant-Appellee and CALIFORNIA FRANCHISE TAX BOARD, Counter-defendants-Appellees and DR. ROBERT M. PECK, as Trustee for the Robert M. Peck, M.D. Inc., Defined Benefit Pension Trust; RUTH R. PECK Counter-defendants-Appellants	)	
SUSIE J. HENRY, v. IRA REINER et al., Defendant	)	D.C. No. CV-90-3972HLH

Appeal from the U.S. District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted August 31, 1993
Pasadena, California

Before: TANG, CANBY, AND BEEZER, Circuit Judges.

Robert and Ruth Peck appeal the district court's summary judgment in favor of the Internal Revenue Service ("IRS"). The court concluded the IRS' claim to interpleader funds had priority over the Pecks' claim. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I

Stephen Henry, an investment advisor, embezzled the Pecks' funds. On October 1, 1986, the Pecks, weary of Henry's excuses for not returning their money, sued Henry and attached his real property. On November 18, 1986, Henry made a general assignment of his assets for the benefit of creditors to Earle Hagen. Henry's assets were worth approximately $1,000,000 and his clients claimed the entire estate. In addition, Henry's wife held a promissory note signed by Henry for $305,000, and First Professional Bank had sued to collect a loan for $320,000 on which Henry had defaulted. After Henry was charged with and pleaded guilty to grand theft, the IRS asserted a claim for payment of unpaid taxes exceeding $4,000,000, and the Franchise Tax Board of California sought approximately $1,000,000 in unpaid state

taxes.

By early 1989, Hagen had liquidated the estate and initiated an interpleader proceeding. The Pecks and the IRS, among others, stipulated to facts for the purpose of determining priority of claims to the funds. On cross-motions for summary judgment, the district court concluded the IRS' claim had priority over the Pecks' claim.

II

We review the grant of summary judgment de novo. T.W. Elec. Serv., Inc., v. Pacific Elec. Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). Viewing the evidence in the light most favorable to the Pecks, we hold there are no genuine issues of material fact to be tried and the IRS is entitled to judgment as a matter of law. Id. at 630; Fed. R. Civ. P. 56(c).

A

The Pecks contend the embezzled funds were not taxable income to Henry. Case law establishes, however, that Henry owed income taxes on the funds he embezzled. James v. United States, 366 U.S. 213 (1961); Cohen v. United States, 297 F.2d 760, 769 (9th Cir.), cert. denied, 369 U.S. 365 (1962).

B

The IRS has a first-priority claim when a debtor who owes federal taxes is insolvent and "without enough property to pay all debts makes a voluntary assignment of property." 31 U.S.C. § 3713(a)(1)(A)(i). The Pecks contend 3713 does not apply to the present case. We disagree.

The Pecks first argue that the IRS failed to prove Henry was insolvent when he transferred his assets to Hagen. The record shows, however, that when Henry made his assignment, the claims of his creditors went far beyond Henry's ability to pay. The assignment of all his assets was itself evidence of Henry's insolvency. See Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483, 488 (1926) (noting statute applies when debtor's insolvency "is shown" in any of ways stated in statute). Because the insolvency statute "has reference to the public good" and "ought to be liberally construed," the burden lies with those who argue against the government's priority claims to show the statute does not apply. Id. at 487; see also United States v. Cole, 733 F.2d 651, 654 (9th Cir. 1984). Once the IRS, as the party moving for sum-

mary judgment, demonstrated Henry's insolvency, the Pecks were obligated to "set forth specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e). The Pecks failed to present evidence of any kind demonstrating Henry was solvent. There was thus no triable issue of fact on Henry's solvency.

The Pecks further contend the transfer of Henry's assets was not a "voluntary assignment of property" within the meaning of § 3713 because the transfer did not divest Henry of absolutely all his property. This argument must be rejected under § 3713 and relevant case law. Henry transferred to Hagen "all of the property and assets of [Henry] of every kind and nature . . . not exempt from execution." A transfer of assets is sufficient under the statute if it constitutes, as does

Henry's transfer, a "general divestment of property." United States v. Hooe, 7 U.S. (3Cranch) 73, 91 (1805). That Henry may not have been stripped bare of all his assets or have physically turned over some of the assigned property to Hagen makes no difference. Under the assignment, Hagen has the duty to administer Henry's entire estate for the benefit of the Pecks and other creditors. See 31 U.S.C. § 3713(b).

C

The Pecks argue § 3713 excepts their lien against Henry's real property from impairment. Although the language of § 3713 admits of no exceptions to the statute, the United States Supreme Court has hinted for many years that a "specific and perfected" lien may have priority over the United States' claim. E.g., United

States v. Vermont, 377 U.S. 351, 357-58 & n.8 (1964); United States v. Gilbert Assocs., Inc., 345 U.S. 361, 365-66 (1953); United States v. Waddill, Holland, & Flinn, Inc., 323 U.S. 353, 355-60 (1945). We have stated that such an exception might exist. See Nesbitt v. United States, 622 F.2d 433 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981). For purposes of this hypothetical exception, however, the Supreme Court has declared that "specificity" requires the lien claimant to take physical possession of the attached property before the debtor's voluntary assignment of assets. Gilbert Assocs., 345 U.S. at 366; Waddill, Holland & Flinn, 323 U.S. at 355. Because the Pecks did not have possession of the attached real property on the relevant date, their lien does not fall within the purported exception.

D

Because the IRS' claim exceeds the funds available to satisfy that claim, we need not address the Pecks' arguments regarding the priority of the Franchise Tax Board.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NO. 92-55304

ARNOLD ROBERT ABRAMS, et al. USDC NO. CV-87-7220
Plaintiffs - Appellees
v.
UNION BANK, et al.
Defendants - Appellees
- -
EARLE HAGEN, Assignee for the Benefit of Creditors of Stephen H. Henry,
Defendant - Appellee
v.
INTERNAL REVENUE SERVICE,
Counter-defendant - Appellee and
CALIFORNIA FRANCHISE TAX BOARD, et al.,
Counter-defendants - Appellees and
DR. ROBERT M. PECK, as Trustee for the Robert M. Peck, M.D., Inc. Defined Benefit Pension Trust; RUTH R. PECK
Counter-defendants - Appellants

SUSIE J. HENRY, USDC NO. CV-90-3972
Plaintiff-Appellee [CONSOLIDATED CASE]
v.
IRA REINER, et al.
Defendants.

APPELLANTS' PETITION FOR REHEARING

RAPHAEL METZGER, ESQ.
350 Elm Avenue, Second Floor
Long Beach, California 90802
(310) 437-4499
Attorneys for Appellants
Dr. Robert M. Peck and Mrs. Ruth R. Peck

TO CATHY A. CATTERSON, CLERK OF THE COURT:

Appellants, Dr. Robert M. Peck and Ruth R. Peck, hereby petition the Court for Rehearing of the judgment entered in this appeal on September 22, 1993.

Rehearing is sought on the ground that material points of law were overlooked in the decision of the court, to wit, Appellant's claims under the Due Process and Takings clauses of the Fifth Amendment of the United States Constitution. Said issues were properly and timely asserted in the District Court and briefed to this Court, being the subject of discussion on pages 30 through 42 of Appellants' Opening Brief. Although these claims present substantial issues of constitutional law for decision, the Court's Memorandum Opinion not only doesn't determine their merit, but fails

even to make reference to them. Indeed, the constitutional issues are of such significance that Appellants suggest that rehearing of this matter be by the Ninth Circuit en banc.

This Petition is based upon this document, the Memorandum of Points and Authorities and Declaration of Raphael Metzger attached hereto, upon the Briefs, Excerpt of Record, Pleadings and other papers on file herein, upon all matters judicially noticeable, and upon such argument as the Court may allow.

DATED: October 1, 1993

LAW OFFICES OF RAPHAEL METZGER

RAPHAEL METZGER, ESQ.
Attorneys for Appellants, Dr. Robert M. Peck, as Trustee for the Robert M. Peck, M.D. Inc., Defined Benefit Pension Trust, and Ruth R. Peck

MEMORANDUM OF POINTS AND AUTHORITIES

I. A PETITION FOR REHEARING MAY BE FILED WHERE THE COURT HAS OVERLOOKED A SIGNIFICANT POINT OF LAW

Rule 40 of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> (a) A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in

support of the petition as the petitioner desires to present.

Thus, a petition for rehearing may be filed where the Court has overlooked a significant point of law.

II. THE MEMORANDUM OPINION CONSTITUTING THE COURT'S JUDGMENT DOES NOT DETERMINE THE MERIT OF PETITIONERS' CONSTITUTIONAL CLAIMS

Appellants timely and properly asserted substantive due process and takings claims under the Fifth Amendment of the federal Constitution in the District Court. (CR 335 at pp. 22-24) Appellants timely and properly renewed these claims for hearing before this Court. (Appellants' Opening Brief, Section XI at pp. 30-42). However, like

the District Court, this Court did not determine the merit of Appellants' constitutional claims. Indeed, the Memorandum Opinion issued by the Court does not even mention that Appellants asserted such claims, let alone decide them. Since the Judges of this Court have taken an oath to uphold the Constitution of the United States, Appellants can only surmise that the Court inadvertently overlooked Appellants' constitutional claims. Such omission constitutes the very ground specified in Rule 40 of the Federal Rules of Appellate Procedure for rehearing.

III. THE COURT HAS AN AFFIRMATIVE OBLIGATION TO DETERMINE THE MERIT OF APPELLANTS' CONSTITUTIONAL CLAIMS

In the seminal case of Marbury v.

Madison, 5 U.S. (1 Cranch) 137, 177-178 (1803), Chief Justice Marshall wrote:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the

constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . .

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

Ever since Marbury v. Madison, the federal courts of appeal have had an affirmative obligation to decide constitutional claims properly raised by parties before them. It necessarily must be so. For what rights does the federal constitution confer upon the people if our federal courts omit to determine the constitutional claims of litigants?

IV. CONCLUSION

For each of the foregoing reasons, the Court should grant this Petition for Rehearing, carefully consider Appellants' constitutional claims, and expressly decide them in an opinion to be published for the benefit of the litigants, the bar, and the people. DATED: October 1, 1993

LAW OFFICES OF RAPHAEL METZGER

RAPHAEL METZGER, ESQ.
Attorneys for Appellants

DECLARATION OF RAPHAEL METZGER

I, Raphael Metzger, declare as follows:

1. I am an attorney at law, duly licensed and authorized to practice law in the State of California. I am a member of all federal district courts in the State of California, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court.

2. I have personal knowledge of the matters set forth hereinafter and, if called as a witness, I would competently testify thereto.

3. I represent Appellants, Dr. Robert M. Peck, as Trustee for the Robert M. Peck, M.D. Inc., Defined Benefit Pension Trust, and Ruth R. Peck, in this appeal.

4. I have carefully reviewed the Memorandum Opinion issued by the Court in this matter. The Memorandum does not determine the merit of Appellants' constitutional claims for violations of substantive due process and unlawful takings under the Fifth Amendment. Nor does the Memorandum even indicate that Appellants asserted such claims in their appeal.

5. Since it is the obligation of the Court to hear and determine Appellants' properly raised constitutional claims and the Memorandum Opinion does not do so, it appears that the Court inadvertently overlooked Appellants' constitutional claims.

6. For these reasons and the other reasons expressed herein, I believe that a rehearing of this appeal should be granted.

7. I further believe that to do otherwise would deprive my clients of their right to a determination of their constitutional claims.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed October 1, 1993, at Long Beach, California.

_____

Raphael Metzger

NOT FOR PUBLICATION

F I L E D
NOV - 2 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNOLD ROBERT ABRAMS, et al. Plaintiff-Appellee, v. UNION BANK, et al. Defendants-Appellees.	)	No. 92-553-4 D.C. No. CV87-7220 HLH A M E N D E D MEMORANDUM*
EARLE HAGEN, Assignee for the Benefit of Creditors of Stephen H. Henry, Defendant-Appellee v. INTERNAL REVENUE SERVICE, Counter-defendant-Appellee and CALIFORNIA FRANCHISE TAX BOARD, Counter-defendants-Appellees and DR. ROBERT M. PECK, as Trustee for the Robert M. Peck, M.D. Inc., Defined Benefit Pension Trust; RUTH R. PECK Counter-defendants-Appellants	)	
SUSIE J. HENRY, v. IRA REINER et al., Defendant	)	D.C. No. CV-90-3972HLH

Appeal from the U.S. District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted August 31, 1993
Pasadena, California

Before: TANG, CANBY, AND BEEZER, Circuit Judges.

Robert and Ruth Peck appeal the district court's summary judgment in favor of the Internal Revenue Service ("IRS"). The court concluded the IRS' claim to interpleader funds had priority over the Pecks' claim. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

---

*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I

Stephen Henry, an investment advisor, embezzled the Pecks' funds. On October 1, 1986, the Pecks, weary of Henry's excuses for not returning their money, sued Henry and attached his real property. On November 18, 1986, Henry made a general assignment of his assets for the benefit of creditors to Earle Hagen. Henry's assets were worth approximately $1,000,000 and his clients claimed the entire estate. In addition, Henry's wife held a promissory note signed by Henry for $305,000, and First Professional Bank had sued to collect a loan for $320,000 on which Henry had defaulted. After Henry was charged with and pleaded guilty to grand theft, the IRS asserted a claim for payment of unpaid taxes exceeding $4,000,000, and the Franchise Tax Board of California sought approximately $1,000,000 in unpaid state

taxes.

By early 1989, Hagen had liquidated the estate and initiated an interpleader proceeding. The Pecks and the IRS, among others, stipulated to facts for the purpose of determining priority of claims to the funds. On cross-motions for summary judgment, the district court concluded the IRS' claim had priority over the Pecks' claim.

II

We review the grant of summary judgment de novo. T.W. Elec. Serv., Inc., v. Pacific Elec. Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). Viewing the evidence in the light most favorable to the Pecks, we hold there are no genuine issues of material fact to be tried and the IRS is entitled to judgment as a matter of law. Id. at 630; Fed. R. Civ. P. 56(c).

A

The Pecks contend the embezzled funds were not taxable income to Henry. Case law establishes, however, that Henry owed income taxes on the funds he embezzled. James v. United States, 366 U.S. 213 (1961); Cohen v. United States, 297 F.2d 760, 769 (9th Cir.), cert. denied, 369 U.S. 365 (1962).

B

The IRS has a first-priority claim when a debtor who owes federal taxes is insolvent and "without enough property to pay all debts makes a voluntary assignment of property." 31 U.S.C. § 3713(a)(1)(A)(i). The Pecks contend 3713 does not apply to the present case. We disagree.

The Pecks first argue that the IRS

failed to prove Henry was insolvent when he transferred his assets to Hagen. The record shows, however, that when Henry made his assignment, the claims of his creditors went far beyond Henry's ability to pay. The assignment of all his assets was itself evidence of Henry's insolvency. See Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483, 488 (1926) (noting statute applies when debtor's insolvency "is shown" in any of ways stated in statute). Because the insolvency statute "has reference to the public good" and "ought to be liberally construed," the burden lies with those who argue against the government's priority claims to show the statute does not apply. Id. at 487; see also United States v. Cole, 733 F.2d 651, 654 (9th Cir. 1984). Once the IRS, as the party moving for sum-

mary judgment, demonstrated Henry's insolvency, the Pecks were obligated to "set forth specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e). The Pecks failed to present evidence of any kind demonstrating Henry was solvent. There was thus no triable issue of fact on Henry's solvency.

The Pecks further contend the transfer of Henry's assets was not a "voluntary assignment of property" within the meaning of § 3713 because the transfer did not divest Henry of absolutely all his property. This argument must be rejected under § 3713 and relevant case law. Henry transferred to Hagen "all of the property and assets of [Henry] of every kind and nature . . . not exempt from execution." A transfer of assets is sufficient under the statute if it constitutes, as does

Henry's transfer, a "general divestment of property." United States v. Hooe, 7 U.S. (3Cranch) 73, 91 (1805). That Henry may not have been stripped bare of all his assets or have physically turned over some of the assigned property to Hagen makes no difference. Under the assignment, Hagen has the duty to administer Henry's entire estate for the benefit of the Pecks and other creditors. See 31 U.S.C. § 3713(b).

C

The Pecks argue § 3713 excepts their lien against Henry's real property from impairment. Although the language of § 3713 admits of no exceptions to the statute, the United States Supreme Court has hinted for many years that a "specific and perfected" lien may have priority over the United States' claim. E.g., United

States v. Vermont, 377 U.S. 351, 357-58 & n.8 (1964); United States v. Gilbert Assocs., Inc., 345 U.S. 361, 365-66 (1953); United States v. Waddill, Holland, & Flinn, Inc., 323 U.S. 353, 355-60 (1945). We have stated that such an exception might exist. See Nesbitt v. United States, 622 F.2d 433 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981). For purposes of this hypothetical exception, however, the Supreme Court has declared that "specificity" requires the lien claimant to take physical possession of the attached property before the debtor's voluntary assignment of assets. Gilbert Assocs., 345 U.S. at 366; Waddill, Holland & Flinn, 323 U.S. at 355. Because the Pecks did not have possession of the attached real property on the relevant date, their lien does not fall within the purported exception.

III

The Pecks insist the Fifth Amendment to the U.S. Constitution "trumps" § 3713. Section 3713 does not offend the Fifth Amendment. It is rooted in the English common law and reflects the prerogative of the sovereign to require that debts owed to it be paid before the debts owed to other creditors. See United States v. Moore, 423 U.S. 77, 80 (1975). Section 3713 or a similar predecessor statute has been in effect almost since the country's formation, serving the important public policy of securing adequate revenue for the federal government. See id. at 81-82. Although its application may work hardship on creditors other than the United States, § 3713 is not "merely arbitrary and capricious." Barclay & Co. v. Edwards, 267 U.S. 442, 450 (1924). Because the original version of § 3713 was enacted

over two hundred years ago, its enactment did not result in a "taking" of the Pecks' lien interest; no pre-existing property right has been impaired by the subsequent enactment of a statute. See United States v. Security Indus. Bank, 459 U.S. 70, 78-82 (1982).

IV

Because the IRS' claim exceeds the funds available to satisfy that claim, we need not address the Pecks' arguments regarding the priority of the Franchise Tax Board.

AFFIRMED.

NOT FOR PUBLICATION

F I L E D
NOV - 2 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNOLD ROBERT ABRAMS, et al.	)	No. 92-553-4
Plaintiff-Appellee,	)	D.C. No.
v.	)	CV87-7220 HLH
UNION BANK, et al.	)	
Defendants-Appellees.	)	ORDER
----------	)	
EARLE HAGEN, Assignee for the Benefit of Creditors of Stephen H. Henry,	)	
Defendant-Appellee	)	
v.	)	
INTERNAL REVENUE SERVICE, Counter-defendant-Appellee	)	
and	)	
CALIFORNIA FRANCHISE TAX BOARD, Counter-defendants-Appellees	)	
and	)	
DR. ROBERT M. PECK, as Trustee for the Robert M. Peck, M.D. Inc., Defined Benefit Pension Trust; RUTH R. PECK	)	
Counter-defendants-Appellants	)	
----------	)	
SUSIE J. HENRY, v. IRA REINER et al.	)	D.C. No. CV-90-3972HLH

Before: TANG, CANBY, AND BEEZER, Circuit Judges.

The petition for rehearing has been considered and is **DENIED.**

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of 18 and not a party to the within action. My business address is 350 Elm Avenue, Second Floor, Long Beach, CA 90802. On February 14, 1994, I served the within PETITION FOR WRIT OF CERTIORARI on the parties in this action by placing a true copy thereof enclosed in a envelope with postage thereon fully prepaid, in the United States mail at Long Beach, CA addressed as follows:

SOLICITOR GENERAL
Dept. of Justice
Washington, DC 20530

MURRAY S. HORWITZ, ESQ.
Chief, Appellate Section
Tax Division, Dept. of Justice
P.O. Box 502
Washington, D.C. 20044

THOMAS B. COKER, ESQ.
Office of the U.S. Attorney
300 N. Los Angeles St.
Los Angeles, CA 90013

CATHY CATTERSON, CLERK
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Carolyn J. H. Bryant, Declarant

Supreme Court, U.S.
FILED
APR - 5 1994
OFFICE OF THE CLERK

No. 93-1315

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT M. PECK, TRUSTEE FOR THE ROBERT M. PECK, M.D., INC., DEFINED BENEFIT PENSION TRUST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

WILLIAM S. ESTABROOK
PATRICIA M. BOWMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, on the facts of this case, the claim of the United States for taxes owed on income received from embezzlement has priority under 31 U.S.C. 3713 in the assets assigned by the embezzler for the benefit of his creditors.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1315

ROBERT M. PECK, TRUSTEE FOR THE ROBERT M. PECK, M.D., INC., DEFINED BENEFIT PENSION TRUST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (Pet. App. D1-D10) and amended opinion (Pet. App. F1-F11) of the court of appeals are unreported, but the judgment is noted at 9 F.3d 1550 (Table). The opinion of the district court (Pet. App. A1-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1993. The amended opinion of the court of appeals was filed on November 2, 1993. The petition for rehearing was denied on that same day (Pet. App. G1-G2). The petition for a writ of certiorari was filed on January

28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An investment advisor named Stephen Henry embezzled funds from petitioners. "On October 1, 1986, [petitioners], weary of Henry's excuses for not returning their money, sued Henry and attached his real property" (Pet. App. D3). Petitioners commenced this action in state court. Due to petitioners' allegations of civil RICO violations (18 U.S.C. 1964) by Henry, the case was removed to federal district court.

On November 18, 1986, Henry made a general assignment of his assets for the benefit of his creditors to Earle Hagen (Pet. App. D3-D4):

> Henry's assets were worth approximately $1,000,000 and his clients claimed the entire estate. In addition, Henry's wife held a promissory note signed by Henry for $305,000, and First Professional Bank had sued to collect a loan for $320,000 on which Henry had defaulted. After Henry was charged with and pleaded guilty to grand theft, the IRS asserted a claim for payment of unpaid taxes exceeding $4,000,000, and the Franchise Tax Board of California sought approximately $1,000,000 in unpaid state taxes.

Hagen interpled the property that Henry transferred to him under the assignment for the benefit of creditors. The United States was joined in the litigation as an additional party in interest.

2. On cross-motions for summary judgment, the district court concluded that the United States' claim for the taxes owed by Henry had priority over petitioners'

unsecured claim in the funds (Pet. App. D4).[1] 31 U.S.C. 3713 provides that "[a] claim of the United States Government shall be paid first" when "a person indebted to the Government is insolvent" and "the debtor without enough property to pay all debts makes a voluntary assignment of property" (31 U.S.C. 3713(a)(1)(A)(i)). The court concluded that the assignment for the benefit of creditors by Henry was an act of insolvency by him and that the tax claim of the United States therefore has priority in the property transferred by Henry on that date under 31 U.S.C. 3713 (Pet. App. A5).

On the date of insolvency, petitioners had only a pre-judgment attachment lien, not a judgment lien or other perfected security interest. The court held that the subsequent perfection of petitioners' lien—by obtaining a judgment and execution levy—did not divest the claim of the United States of the priority it obtained under 31 U.S.C. 3713 on the date the property was transferred by the assignment for the benefit of creditors (Pet. App. A5, A15-A19).

3. The court of appeals affirmed (Pet. App. D1-D10). In *James* v. *United States*, 366 U.S. 213 (1961), this Court held that funds obtained by embezzlement represent taxable income to the embezzler. The court of appeals concluded that the government's claim for the payment of these taxes has priority in the distribution of Henry's assets under 31 U.S.C. 3713(a)(1)(A)(i) because Henry was insolvent at the time he made a voluntary assignment of his property. The court stated that, to de-

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[1] The parties entered into a stipulation of facts for the purpose of determining the priorities of their claims in the interpled funds (Pet. App. A3). Petitioners made no attempt to establish that these funds were in fact their money or could be traced to an account in which their money had been deposited.

feat the priority established for government claims under 31 U.S.C. 3713, the competing lien must be perfected and must have divested the debtor of title to the property *before* the debtor became insolvent and made the voluntary assignment of assets. Because petitioners did not have title to the property, or possession of it, on the relevant date, the court concluded that the federal claim was entitled to priority under 31 U.S.C. 3713 (Pet. App. D5-D9).

4. In an amended opinion (Pet. App. F1-F11), the court of appeals additionally rejected petitioners' claim that the federal priority statute violates the Fifth Amendment to the Constitution. The court noted that the Federal Insolvency Statute is almost as old as the Constitution and "is rooted in the English common law" (Pet. App. F10). The statute "reflects the prerogative of the sovereign to require that debts owed to it be paid before the debts owed to other creditors" (*ibid.*). The court concluded that the statute does not violate due process because, "[a]lthough its application may work hardship on creditors other than the United States, § 3713 is not 'merely arbitrary and capricious'" (Pet. App. F10, quoting *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450 (1924)). Furthermore, since "the original version of § 3713 was enacted over two hundred years ago, its enactment did not result in a 'taking' of [petitioners'] lien interest" (Pet. App. F10-F11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In *James* v. *United States*, 366 U.S. 213 (1961), this Court overruled *Commissioner* v. *Wilcox*, 327 U.S. 404

(1946), and held that embezzled funds represent taxable income to the embezzler in the year of embezzlement. Under 31 U.S.C. 3713, the claim of the United States for the payment of taxes has a first priority when a taxpayer who is "without enough property to pay all debts makes a voluntary assignment of property." 31 U.S.C. 3713(a)(1)(A)(i). See *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483, 490 (1926).[2]

In this case, the court of appeals correctly held that Henry owed federal income taxes on the funds he embezzled. See *James* v. *United States*, 366 U.S. at 218-220; *Cohen* v. *United States*, 297 F.2d 760, 769 (9th Cir.), cert. denied, 369 U.S. 865 (1962). The court also correctly concluded that Henry was insolvent on November 18, 1986, when he made a voluntary assignment of his property for the benefit of his creditors (Pet. App. D3-D4). Under the plain language of 31 U.S.C. 3713, the claim of the United States is therefore entitled to "be paid first" from the assets transferred by Henry's "voluntary assignment of property" (31 U.S.C. 3713(a)(1)(A)(i)).

Petitioners do not contend that the decision in this case conflicts with the decision of any other court of appeals. To the contrary, other courts have reached the same conclusion in similar factual circumstances. See, *e.g.*, *United States* v. *Gotwals*, 156 F.2d 692, 695 (10th Cir.), cert. denied, 329 U.S. 781 (1946); *Brown* v. *Coleman*, 566 A.2d 1091, 1095-1096 (Md. 1989).

2. Petitioners urge the Court (Pet. 7-12) to modify its decision in *James* v. *United States*, *supra*, in such a manner as to ensure that victims of embezzlement, rather than the United States, will be "paid first" (31 U.S.C. 3713(a)(1)) from the embezzler's assets. Their de-

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[2] This priority provision is expressly inapplicable "to a case under title 11" of the United States Code. 31 U.S.C. 3713(a)(2).

sire to alter the statutory collection scheme that Congress adopted almost 200 years ago should, of course, be directed to the Legislature, not to the courts. Moreover, contrary to petitioners' contention (Pet. 8), the Court was fully aware of the consequences that its decision in *James* would have in the distribution of the embezzler's assets under 31 U.S.C. 3713. The partial dissent of Justice Black in that case noted those specific concerns (366 U.S. at 229):

> All of us know that with the strong lien provisions of the federal income tax law an owner of stolen funds would have a very rocky road to travel before he got back, without paying a good slice to the Federal Government, such funds as an embezzler who had not paid the tax might, perchance, not have dissipated. An illustration of what this could mean to a defrauded employer is shown in this very case by the employer's loss of some $700,000, upon which the Government claims a tax of $559,000.

See also *id.* at 252 (Whittaker, J., concurring in part and dissenting in part). The majority in *James*, however, viewed taxation of illegal gains as essential "to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune." *Id.* at 218. See also *id.* at 241 (Harlan, J., concurring in part and dissenting in part).

In short, as the court of appeals correctly concluded, nothing in *James* or in 31 U.S.C. 3713 permits a distinction to be made between the collection of taxes owed from legal or illegal activities. Nor is there any conflict among the courts of appeals on the issue that petitioners request this Court to address.

3. Petitioners further contend (Pet. 12-21) that application of 31 U.S.C. 3713 to the facts of this case violates

the Fifth Amendment to the Constitution. As the court of appeals recognized, however, petitioners held only an unperfected claim against the debtor's estate at the time the federal claim arose (Pet. App. D8-D9). See *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 365-366 (1953); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355-360 (1945). Application of the federal priority statute to this case does not deprive petitioners of due process of law—every statute regulating the priorities of competing claimants necessarily places some claims ahead of others. As the court of appeals noted, because "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States*, 295 U.S. 247, 259 (1935)), the priority established by federal law for the collection of taxes is not "merely arbitrary and capricious" (*Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450 (1924)) and does not violate due process (Pet. App. F10).

Moreover, the Federal Insolvency Statute did not effect a "taking" of petitioners' pre-judgment attachment lien interest. This priority statute "is almost as old as the Constitution, and its roots reach back even further into the English common law" (*United States* v. *Moore*, 423 U.S. 77, 80 (1975)). The substantive rights conferred by the statute have remained virtually unchanged since 1797. See, *e.g.*, Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515, as amended by Section 65 of the Act of March 2, 1799, ch. 22, 1 Stat. 676; *United States* v. *Moore*, 423 U.S. at 81. The priority statute advances the public policy of "secur[ing] an adequate revenue to sustain the public burthens and discharge the public debts." *United States* v. *Moore*, 423 U.S. at 81, quoting *United States* v. *State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 35 (1832). Application of this ancient priority statute to this case does not effect a "taking" of petitioners' lien. Under 31

U.S.C. 3713, the government's lien arose before petitioners perfected their lien by judgment. In view of the fact that the federal statute was enacted in 1797, petitioners obviously cannot claim that their lien was impaired by the subsequent enactment of a statute. See *United States* v. *Security Industrial Bank*, 459 U.S. 70, 78-82 (1982); *Westmoreland* v. *Westmoreland*, 716 F. Supp. 217, 222 (D.S.C. 1988).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

WILLIAM S. ESTABROOK
PATRICIA M. BOWMAN
Attorneys

APRIL 1994

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[3] Petitioners assert that their pre-judgment attachment lien was a property interest within the meaning of the Fifth Amendment. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 689-690 (1981); *Armstrong* v. *United States*, 364 U.S 40, 44-46 (1960). Nevertheless, their lien had not been perfected by judgment and remained contingent at the time of the assignment for the benefit of creditors when the priority of the United States was established under 31 U.S.C. 3713. See *United States* v. *Moore*, 423 U.S. at 85 n.5 (obligations of insolvent debtor are determined "on the facts as they exist at the time of the assignment for the benefit of creditors; subsequent events cannot defeat the obligation").